Supreme Court, U.S.
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No. 98-983

In The

# Supreme Court of the United States

October Term, 1998

CECILIA LACKS,

*Petitioner,*

v.

FERGUSON-FLORISSANT REORGANIZED SCHOOL DISTRICT, R-2,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit Court of Appeals properly reversed the jury's verdict in favor of Petitioner on her First Amendment claim and directed that judgment be entered in favor of Respondent where, *assuming* the existence of a "notice" requirement under the First Amendment, Petitioner acknowledged the existence of Respondent's policy against the use of profanity, yet permitted student use of profanity under the guise of a particular teaching method?*

2. Whether the Eighth Circuit Court of Appeals properly reversed the jury's verdict in favor of Petitioner on her race discrimination claim and directed that judgment be entered in favor of Respondent where Petitioner provided no evidence that Petitioner's allegedly racially biased supervisors tainted the process resulting in Petitioner's termination?

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*Respondent respectfully suggests that Petitioner's first question presented ignores the threshold issue of whether Petitioner's speech is protected in the first instance. Moreover, even assuming, *arguendo*, that Petitioner's speech is protected, thus invoking the First Amendment, Petitioner fails to precisely articulate the First Amendment issue before this Court and misrepresents the conclusion reached by the Eighth Circuit Court of Appeals in this regard. The Board of Education is the sole entity responsible for defining and implementing the curriculum taught in our schools. No individual teacher's rights are so broad as to supplant the fundamental responsibility and obligation of the Board of Education to educate children.

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## INTRODUCTION

Certiorari should not be granted in this case, as the issues raised by Petitioner have been addressed and adjudicated consistently, on numerous occasions, by courts throughout the country. Furthermore, the decision of the United States Court of Appeals for the Eighth Circuit is entirely consistent with that precedent, thus obviating the need for this Court to exercise its supervisory authority.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 147 F.3d 718 (8th Cir. 1998). Petitioner filed a Motion for Rehearing and Rehearing En Banc, which the Eighth Circuit Court of Appeals denied. However, Judge McMillian dissented from the denial of rehearing en banc. His opinion is reported at 153 F.3d 904 (8th Cir. 1998). Although not at issue in this Petition, the Order of the United States District Court for the Eastern District of Missouri, entering summary judgment in favor of Respondent on Petitioner's Due Process claim, is reported at 936 F. Supp. 676 (E.D.Mo. 1996). Respondent is not aware of the existence of any officially reported judgment or order entered by the United States District Court for the Eastern District of Missouri following the jury's verdict on Petitioner's remaining claims.

## JURISDICTION

Jurisdiction over this Petition is proper pursuant to 28 U.S.C. § 1254(1). However, Petitioner fails to proffer a sufficient basis to invoke this Court's review.

Supreme Court Rule 10 provides in relevant part:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * *
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Supreme Court Rule 10.

Petitioner claims that this Court has thus far not addressed the issues asserted in this Petition and that the decision of the Eighth Circuit Court of Appeals conflicts with decisions of other United States appellate courts. To

the contrary, the leading authority relevant to the issues in this case is entirely consistent with the Eighth Circuit's opinion. At most, the instant Petition constitutes re-argument. Further, Petitioner fails to provide any substantive, much less persuasive, reasons why the issues in this case may correctly be characterized as "important questions of federal law." Therefore, denial of the instant Petition is appropriate.

## STATEMENT OF CASE

### A. Respondent's Version

In or about October, 1994, Petitioner Cecilia Lacks, a Caucasian, tenured teacher, directed her eleventh-grade English Class to write and perform a short play. Petitioner reviewed the students' plays and ultimately directed her students to perform their plays before the entire class, while being videotaped. Subsequently, students, and perhaps others, reviewed the videotaped performances. Copies of the videotapes are submitted contemporaneously herewith as the appendix to Respondent's Brief in Opposition To Petition For Writ Of Certiorari.

Several weeks later, the District learned, for the first time, that these plays contained extreme, offensive levels of profanity, in addition to simulated acts of sexual intercourse, desecration of a corpse, gang violence, as well as other similarly mature subjects. In fact, during the thirty-eight-minute running time of the plays, words like "nigger," "fuck," "shit," "bitch," and "mother-fucker" were

used over 165 times or once every twelve seconds. Tr. Tr. 286.[1]

The use of profanity, such as the language depicted in the videotapes, is contrary to the Board's Student Discipline Policy and is contrary to any semblance of accepted behavior. Based on the videotapes, as well as evidence of other instances of profane, vulgar and inappropriate language used by students in Petitioner's classroom, under Petitioner's auspices, the Board terminated Petitioner's employment.

Petitioner admits that the plays contained an extreme quantity of profanity. Petitioner also concedes that the Board's "policy against the use of profanity . . . [is not] arbitrary," and that she in fact knew that this Board had such a policy. Hrg. Tr. 544. Similarly, Petitioner's own expert acknowledges that a school district is duty-bound to set standards of student decorum and to establish minimum levels of civility, including restricting the use of profanity in student-written, creative works. Tr. Tr. 883-84. Further, Petitioner concedes that she was contractually bound to enforce the student discipline code, Tr. Tr. 562-63, and that, in fact, she had disciplined students in the past for using profanity. Tr. Tr. 452, 1037.

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[1] "Tr. Tr." and "Tr. Exh." refer to the official trial transcript and the exhibits introduced at trial, respectively. Similarly, "Hrg. Tr." and "Hrg. Exh." refer to the transcript and exhibits from the hearing conducted before the School District's Board of Education regarding the termination of Petitioner's employment. Finally, "App." refers to the appendix submitted with Respondent's initial brief before the Eighth Circuit. Respondent is prepared to provide copies of any and all materials upon request of the Court.

Despite Petitioner's confessed awareness of Board Policy, she commenced the underlying action, alleging that the District denied Petitioner her rights under the Missouri Teacher Tenure Act, the Due Process Clause and the First Amendment. Further, Petitioner claims that the Board terminated Petitioner because of her race. Ultimately, the United States Court of Appeals for the Eighth Circuit directed that judgment be entered in favor of the District on all claims of Petitioner's Complaint.

On or about September 17, 1998, the Eighth Circuit denied Petitioner's Motion for Rehearing and Rehearing En Banc. The matter is now before this Court to consider whether, pursuant to Supreme Court Rule 10, consideration by this Court is appropriate to review the disposition of Petitioner's First Amendment and race discrimination claims. Petitioner abandoned her claims under the Missouri Teacher Tenure Act and her Due Process claims.

**B. Petitioner's Statement of the Case is in Error.**

1. Contrary to Petitioner's contention, the Board did not terminate Petitioner's employment because she "failed to discipline students." Rather, the Board terminated Petitioner's employment because she willfully and persistently violated Board Policy by permitting, if not promoting, the egregious conduct depicted in the videotapes and the poems. *See, e.g.*, App. 901-906, Board Findings, ¶ 21; Tr. Tr. 2015. In fact, based *solely* on the videotapes, the Board believed that the violation was "sort of obvious." Tr. Tr. 2015.

Petitioner's contention that Board Policy "had not been applied or been understood to apply to profanity used in work [sic] of fiction or creative writing . . . " is entirely unsupported and unavailing. There is absolutely no evidence of any conduct comparable in content, scope or magnitude to the events depicted in the record before this Court.

2. In framing the issues before this Court, Petitioner erroneously states that the allegedly racially biased supervisors, Vernon Mitchell and John Wright, played "crucial roles in the termination process. . . . " To the contrary, the Board, comprised of seven Caucasian persons, Tr. Tr. 1908-09, unanimously agreed that Petitioner violated Board Policy. Subsequently, five of the seven members of the Board voted to terminate Petitioner's employment. Tr. Tr. 1893, 2012. The two that opposed termination merely disagreed as to the level of discipline. Tr. Tr. 2012.

No administrators were present for the Board's deliberations. Tr. Tr. 2012-13. Furthermore, race was never considered, or even mentioned, as part of the Board's deliberations. Tr. Tr. 1905, 1938, 1972-73.

3. Petitioner's reliance on the jury verdict in favor of Petitioner on her race claim is misleading, as the interrogatories addressed by the jury were inconsistent with the *Price Waterhouse* theory advanced by Petitioner.

4. The evidence at trial clearly reflects Petitioner's authorization or approval of the conduct in her classroom. District personnel testified that through her conduct, Petitioner "set a climate" for [the profanity and inappropriate behavior] to occur. Hrg. Tr. 103. "[T]eachers

give direction and set guidelines and the tone for classroom activity." It is undisputed that Petitioner did nothing "to discourage it." Hrg. Tr. 107.

To the contrary, Petitioner gave her "students tacit approval for this profanity at every stage of this production." Hrg. Tr. 229; *cf.* Tr. Tr. 1875 ("[I]f you allow [profanity in the classroom], you condone it, you can't allow it and say I'm allowing it but only because it happens to be this particular play."). Petitioner's own expert, James Nicholson, testified before the Board that "[Petitioner] had somehow directly or indirectly given [students] permission" to use profanity. Hrg. Tr. 322-33. Even though Mr. Nicholson viewed only ten minutes of the thirty-eight minute videotapes of the student performances, he indicated that he had never seen more profanity in a public school setting than he witnessed in those videotapes. Hrg. Tr. 320, 323.

5. The relevance of t' -vents depicted in the videotapes to the lives of Petitioner s students is entirely irrelevant to the issues in this case. Notwithstanding Petitioner's efforts to redirect the Court's attention, the only matter before this Court is whether Supreme Court Rule 10 compels this Court's review of the Eighth Circuit's adjudication of Petitioner's claims.

6. Petitioner continually alleges "numerous instances" in which the District tolerated *similar* occurrences of student use of profanity in other student plays and writings. These allegations are entirely unsupported by the record before the Court. Contrary to Petitioner's assertion, the use of profanity and other inappropriate

behavior reflected in the evidence in this case is so pervasive, flagrant and reprehensible as to be beyond comparison to any other student-conducted presentations at the District.

7. Petitioner erroneously suggests that Vernon Mitchell, the principal of Berkeley High School, initiated the disciplinary proceedings against Petitioner. Contrary to Petitioner's assertion, the District's Superintendent of Schools, Robert Fritz, Caucasian, initiated the proceedings against Petitioner when he formally charged Petitioner with willful or persistent violation of the published regulations of the Board of Education. App. 613-615; Tr. Exh. C. Petitioner has never alleged any racial bias on the part of Dr. Fritz.

8. Although Petitioner testified that, on prior occasions, she disciplined students for using profanity, Tr. Tr. 452, 1037, there is no evidence to support Petitioner's contention that such efforts rise to the level of "diligent enforcement" of Board Policy. Furthermore, as recognized by the Eighth Circuit, nothing in the Policy that Petitioner professes she diligently enforced creates the exception for profanity in the context of student work contemplated by Petitioner.

In addition to the extreme profanity found in the videotapes, which Petitioner concedes (Hrg. Tr. 551), other student works, also written under Petitioner's supervision, contain similar, extreme profanity. *See* Hrg. Exh. 7; Hrg. Tr. 76-77; Tr. Exhs. H & I. Petitioner's own expert, Karen Price, characterized the first of these poems as a list of obscene words. Tr. Tr. 977. Price concedes the great range of profanity present in the student works and

the videotapes and admitted that she would not have permitted the poems and plays to be read aloud in class. Tr. Tr. 978.

Another of Petitioner's experts, Kathryn Nelson, concedes that the use of such profanity was entirely unnecessary, as creative writing can be taught as effectively without permitting such profanity. Tr. Tr. 1078. Similar to Price, Nelson characterized the language depicted in the poems and the videotapes as "extreme and disgusting." Tr. Tr. 1077. Further, Nelson testified that this is "not the kind of things [sic] that any of us want our children to do." Tr. Tr. 1078.

Consistent with Ms. Nelson's view, Dr. Davis, the District's Assistant Superintendent of Curriculum, saw no "educational significance" to the exercise depicted in the videotapes. Hrg. Tr. 798. By Petitioner's very action and/or inaction, her students "were also told to use profanity." Hrg. Tr. 157-58. Ultimately, "the extreme amount of profanity, and obscenities and vulgarities" led to the Board's decision to terminate Petitioner's employment. Hrg. Tr. 763.

9. The record lacks any evidence that Petitioner's selected teaching method ever previously elicited the level of vulgar, gratuitous profanity present in this record. Furthermore, Petitioner's own experts, proffered to address the propriety of Petitioner's teaching method, testified as to the *impropriety* of the conduct depicted in the student works at issue. *See* Infra.

10. Petitioner's reliance on Vernon Mitchell's statement regarding "black students acting a fool" in the

videotapes is misplaced.[2] Even assuming *arguendo* that Mr. Mitchell made this statement, it does not qualify as "direct evidence" of discrimination, as Mr. Mitchell is not a decision-maker and did not refer to *Petitioner's* race. Given the alleged context of the statement – that it was made to one of Petitioner's students in the course of Mitchell's inquiries about the videotaped performances (Tr. Tr. 1392) – the statement is not *any* evidence of race discrimination, let alone *direct* evidence. Further, the statement fails to create any inference in support of Petitioner's prima facie case of discrimination.

11. The District's inquiry focused on the videotapes of the student plays and copies of written work prepared by Petitioner's students. Further, the District considered only whether Petitioner's conduct violated the Board's Policy against profanity. The Board found that Petitioner committed a willful and persistent violation of Board Policy by permitting, if not promoting, the conduct depicted in the videotapes and the poems. *See, e.g.*, Tr. Tr. 2015. In fact, the Board believed that the violation was "sort of obvious." Tr. Tr. 2015. Similarly, the Superintendent's Cabinet[3] did not express "any doubt that what [Petitioner] had done clearly violated Board policy." Hrg. Tr. 810-11.

12. Contrary to Petitioner's contention, Respondent is not obligated to prove that Petitioner knew that the Board Policy applied specifically to profanity used by her

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[2] None of the witnesses could recall the exact statement allegedly made. *See, e.g.*, Tr. at 711, 1269, 1392.

[3] The Cabinet consists of seven people, only one of which is African-American. Tr. Tr. at 1578.

students in the context of a creative writing exercise. Such specificity is specifically precluded by *Bethel School District v. Fraser*, 478 U.S. 675 (1986) and its progeny.

### C. Proceedings in the Eighth Circuit

With respect to Petitioner's First Amendment claim, the Eighth Circuit assumed, without deciding, the existence of a "notice requirement" under the First Amendment. Assuming the existence of such a requirement, the Eighth Circuit properly found that Respondent's Policy against profanity afforded Petitioner that level of notice to which she may have been entitled.

The evidence in this case is clear. Petitioner knew that Board Policy prohibited the use of profanity. In fact, Petitioner previously disciplined students for the use of profanity. Nevertheless, Petitioner erroneously claims that the Board's Policy against the use of profanity contravenes her First Amendment rights because it does not specify each and every context in which the Board's clear prohibition applies. There is simply no authority to support the imposition of such a strict notice obligation. Rather, the Eighth Circuit decision is entirely consistent with this Court's precedent and, thus, denial of the instant Petition is entirely appropriate.

Similarly, with respect to Petitioner's race claim, it is undisputed that the two allegedly biased administrators did not play any role in the Board's deliberation or ultimate decision to terminate Petitioner's employment. Rather an independent, admittedly unbiased, Board heard over five nights of testimony from Petitioner and fourteen other witnesses and, on its own, concluded that

it was "obvious" that Petitioner violated the Board's Policy. Based on that finding, the Board voted to terminate Petitioner's employment. In the absence of *any* evidence that an allegedly racially biased supervisor *actually tainted* the Board's decision, the Eighth Circuit's decision is entirely consistent with legion of authority in this area and denial of the instant Petition is compelled.

### D. Dissent from Denial of Rehearing

Contrary to the implication of Petitioner's Brief, only Judge McMillian submitted a dissenting opinion. While Judge Morris Arnold dissented from the denial of the Petition for Rehearing, he declined to submit an opinion or to join in Judge McMillian's opinion. Moreover, Judge McMillian dissented from the denial of the Petition for Rehearing *only* with respect to Petitioner's First Amendment claim. Judge McMillian makes no reference to the disposition of Petitioner's race discrimination claims.

Specifically with respect to Petitioner's First Amendment claims, Judge McMillian contends that Petitioner was entitled to a more specific level of notice before she could be terminated for failing to comply with Board Policy. Judge McMillian argues that Petitioner should have received notice that the Board's blanket policy against the use of profanity specifically applied to student use of profanity in the context of written assignments. Respondent respectfully suggests that mandating such a heightened degree of specificity is impractical and unduly burdensome upon the schools charged with the responsibility to create and enforce these policies for the protection of our children.

This Court's precedent specifically recognizes that school board policies and regulations need not be as specific as a criminal code.

## REASONS FOR DENIAL OF THE WRIT

### A. First Amendment Claim

The circuits are in agreement as to the proper disposition of this case. At issue is whether, under the guise of the First Amendment, Petitioner is permitted to dictate school policy, alter the school's curriculum and permit the persistent, flagrant and unredeeming use of profanity by those students entrusted to the District to obtain an education.[4] The Eighth Circuit properly answered this question in the negative and directed the entry of judgment in favor of Respondent. To conclude otherwise would constitute a significant departure from legion of authority. Rather, the Eighth Circuit properly concluded,

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[4] As an initial matter, Respondent respectfully suggests that Petitioner cannot even demonstrate restriction of *her* speech, much less that any such profane speech is protected, especially in the context of a secondary school setting. Protection of obscenity has been consistently rejected as "utterly without redeeming social importance." *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

Consequently, "[o]bscenity may be wholly prohibited" without fear of contravening the First Amendment. *See, e.g., FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978). Certainly there can be no serious debate that phrases such as "suck my dick" (*see* Tr. Exh. I) are lewd, as well as inconsistent with the District's social and moral obligations. *Waters v. Churchill*, 511 U.S. 661, 674 (1994).

consistent with the overwhelming weight of authority, that Petitioner has no such right to abrogate the District's mission.[5]

Attempting to excuse her conduct, Petitioner ignores the issue of whether her speech is protected in the first instance. Instead, Petitioner reargues her contention that the Board's Policy prohibiting *all* profanity is somehow Constitutionally infirm because it fails to specify each and every context in which the Board's clear prohibition applies. However, the specificity sought by Petitioner is simply not compelled. *Cf. Fraser*, 478 U.S. at 668. Rather,

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[5] *See, e.g., Waters v. Churchill*, 511 U.S. at 674 (affording governmental entities greater latitude in restricting speech); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988) (recognizing District's interest in prohibiting student use of profanity); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 686 (1986) (recognizing District's obligation to educate and convey social and moral values, which is inconsistent with condoning profanity); *Board of Educ. v. Pico*, 457 U.S. 853, 920 (1982) (severely restricting "Academic Freedom" in secondary school setting, notwithstanding First Amendment implications); *FCC v. Pacifica Found.*, 438 U.S. at 745 (stating that "[o]bscenity may be wholly prohibited" without fear of contravening the First Amendment); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508 (1969) (holding that inculcation of values is the "work of the schools" and restriction of speech is a valid means to that end); *Keyishian v. Board of Regents*, 385 U.S. 589, 602 (1967) (acknowledging the legitimacy of the state's interest in protecting its education system from subversion); *Chaplinsky*, 315 U.S. at 571-72 (rejecting First Amendment protection for obscenity as "utterly without redeeming social importance"); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 47 (1998) (expressly rejecting teacher's right to define curriculum notwithstanding the First Amendment).

Petitioner's implication that the Board's Policy is so vague as to provide inadequate notice that her speech might result in discipline raises *only* a due process question. *See, e.g., Fraser*, 478 U.S. at 686; *Wolfel v. Morris*, 872 F.2d 712, 717 (6th Cir. 1992) (cited by Petitioner and stating that "*due process* prohibits excessively vague laws.").

Moreover, in light of the fact that the District Court granted summary judgment in favor of Respondent on Petitioner's due process claim, the only portion of the judgment *never challenged* by Petitioner, Petitioner cannot credibly argue a denial of due process at this stage.

Adoption of such a high level of scrutiny for a school board policy as applies to a criminal code is directly contrary to the express mandate of this Court and would create precisely the inconsistency which Supreme Court Rule 10 seeks to avoid. *See, e.g., Fraser*, 478 U.S. at 686.[6] Such a result would have the opposite, inappropriate affect of creating new law both in the Eighth Circuit and arguably every circuit.

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[6] The vast majority of authority expressly rejects a teacher's interest in redefining the curriculum under the guise of the First Amendment. *See, e.g., Drambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1190 (6th Cir. 1995) (refusing to treat teaching method as protected speech); *Silano v. Sag Harbor Union Free Sch. Dist.*, 42 F.3d 719, 723 (2nd Cir. 1994) ("ultimate authority to determine 'what manner of speech in the classroom . . . is appropriate properly rests with the school board . . . .' "); *Hetrick v. Martin*, 480 F.2d 705, 708 (6th Cir. 1973) (denying teacher's First Amendment right to advance pedagogical attitudes inconsistent with those of the school); *Brooks v. School Dist.*, 267 F.2d 733, 739 (8th Cir. 1959) (declaring as beyond reproach district's right to define curriculum).

Petitioner cannot identify a single case, *arising in the secondary school context*, in which a teacher prevailed on an unlawful termination claim based on the alleged inadequacies of a school board promulgated policy. Petitioner's reliance on *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967), quoting *Speiser v. Randall*, 357 U.S. 513 (1958) and *Ward v. Hickey*, 996 F.2d 448, 453-54 (1st Cir. 1993), in support of the existence of a First Amendment "notice" requirement, is unavailing. *Keyishian* is simply inapplicable, as that case involved the propriety of the application of a *statute*, as opposed to a board policy.[7]

Further, *Keyishian* simply does not support Petitioner's asserted entitlement to the level of "notice" she demands in connection with the enforcement of the Board's anti-profanity policy. Consistent with prevailing authority, even if such a notice requirement exists, the policy at issue satisfies any such notice requirement.[8] There is simply no authority that might support the level of specificity of notice to which Petitioner alleges she is entitled. To conclude otherwise would constitute a significant departure from precedent of this Court.[9]

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[7] In addition, *Keyishian* arises in the college context, as opposed to the secondary school context. In the latter setting, greater limitations on speech are necessarily compelled under certain circumstances. *Cf. Fraser*, 478 U.S. 686.

[8] The analysis in *Keyishian* focuses on the "[p]recision of regulation," with the level of precision required to survive Constitutional scrutiny increasing as the nature of the freedom restrained becomes more precious. *Keyishian*, 385 U.S. at 604.

[9] In *Keyishian*, the Supreme Court arguably did not question the existence of a First Amendment right but rather

Petitioner's reliance on authority from the United States Court of Appeals for the First Circuit is similarly unavailing. *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969), cited by Petitioner as supporting the existence of a First Amendment notice requirement, is distinguishable in several respects. Specifically, in *Keefe*, the court considered a state *statute*. There is no such *statute* at issue in this case.

Moreover, *assuming* the existence of a notice requirement,[10] the Eighth Circuit properly concluded that, in this case, the level of profanity exceeded any acceptable "degree," thus making unreasonable any professed belief by Petitioner as to the acceptability of the conduct occurring in her classroom. The Eighth Circuit's conclusion is entirely consistent with the First Circuit's opinion in

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considered, *in the context of a due process analysis*, whether the *statute* at issue was so vague as to preclude "notice" of a limitation of speech. Finally, in support of the District's position, in *Keyishian*, the Supreme Court specifically recognized the "legitimacy of [the State's] interest in protecting its education system from subversion." *Keyishian*, 385 U.S. at 602. Furthermore, Petitioner's reliance on *Speiser*, quoted by the Court in *Keyishian*, is equally unpersuasive, as *Speiser* involved the imposition of *criminal* sanctions for the exercise of certain speech. *Speiser*, 357 U.S. at 525-26. Such facts have no relevance here, as the parties agree that Board policy is not subject to the same level of scrutiny applicable to a criminal statute. Further, the language from *Keyishian* relied upon by Petitioner and set forth in *Speiser* arises in the context of a discussion regarding *due process* requirements, as opposed to First Amendment requirements.

[10] Although Petitioner raises the issue of a First Amendment Notice requirement in her petition, the Eighth Circuit never specifically addresses this issue.

*Keefe*, which also viewed restrictions on speech as a question "of degree." *See Keefe*, 418 F.2d at 362.[11]

Petitioner's reliance on *Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir. 1971), is also detrimental to her argument. In *Mailloux*, the First Circuit recognized that "free speech does not grant teachers a license to say or write in class whatever they may feel like. . . . " *Id.* at 1243. Only through the application of a *case-by-case analysis* can a court ascertain the legitimacy of the interest of the authorities [in] circumscrib[ing] a teacher's speech." *Id.* Consequently, the First Circuit opinion in *Mailloux* promulgates precisely that portion of the Constitutional analysis ignored by Petitioner, to wit: the legitimacy of Respondent's interest in restricting the speech at issue as a measure of the protected nature of Petitioner's speech.

The practical, case-by-case approach advocated by the First Circuit in *Mailloux* is entirely consistent with the Eighth Circuit decision at issue. In a dissenting opinion filed in *Kramer v. Logan County School District No. R-1*, 157 F.3d 620 (8th Cir. 1998), Judge Richard Arnold, the author of the panel decision filed below, describes the analysis in *Lacks* as "fact-specific." Further, consistent with both the panel that considered this case below and the School Board, Judge Arnold concluded that Petitioner's conduct was "egregious" and "obviously" violated Board Policy. *Id.* at 627.

Finally, *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), also cited by Petitioner, is no more persuasive than the

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[11] Moreover, in *Keefe*, the First Circuit specifically declined to "place our decision on this [notice] ground alone." *Id.*

other First Circuit authority cited by Petitioner. Similar to much of the other authority cited by Petitioner in support of her Petition on the First Amendment issue, *Ward* specifically contemplates the existence of protected speech. *Id.* at 452. However, Petitioner fails to address the absence of such protected speech in this case.

Furthermore, in *Ward*, the First Circuit expressly does "*not* hold that a school must expressly prohibit every imaginable inappropriate conduct by teachers." *Id.* at 454 (emphasis added). Rather, identical to the Eighth Circuit analysis, courts must consider whether, "based on existing regulations [and] policies, it was reasonable for the school to expect the teacher to know that her conduct was prohibited?" The Eighth Circuit properly resolved this inquiry in favor of the Respondent. Such a result is consistent with the analysis set forth in *Ward* and every other circuit that has considered this issue. Further, there is no basis to compel the exercise of this Court's oversight power.

Based on the foregoing, it is clear that Petitioner's effort to carve out a "creative writing" exception to the Board's anti-profanity policy is unavailing. First, Petitioner's argument raises *only* a due process question already resolved against Petitioner and never challenged. Second, the result proffered by Petitioner is directly *contrary* to legion of authority, which specifically do *not compel* school board policies to be as specific as a criminal statute. *See, e.g., Kuhlmeier*, 484 U.S. at 273; *Fraser*, 478 U.S. at 686; *Ward*, 996 F.2d at 454.

**B. Race Claim**

Petitioner erroneously contends that the Eighth Circuit's decision in this case is contrary to authority from other circuits, thus compelling this Court to intervene to resolve the alleged conflict.

Notwithstanding Petitioner's assertions, the Eighth Circuit decision is based on the complete absence of any direct evidence of discrimination, as required under the *Price Waterhouse* analysis Petitioner pursued. *See generally, Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).[12] Specifically, given the framework selected by Petitioner, she was obligated to offer *direct* evidence that *her termination* was motivated by her race. She does not, nor can she, offer such evidence. In fact, the evidence, as summarized below, is directly to the contrary. The Board conducted its own, independent analysis, found that Petitioner violated the Board's Policy, and, based on that violation, elected to terminate her employment.

In an effort to circumvent this fatal shortcoming, Petitioner again argues that racially biased administrators tainted the termination process. Petitioner's arguments in support of this Petition are identical to those raised below and merely request this Court to reconsider the prior decisions in this case. Rule 10 is not the proper vehicle for such "reconsideration."

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[12] To the extent that the Panel concluded that Petitioner violated explicit Board policy, even if there were direct evidence of discrimination, which there is not, the Board satisfied its burden of demonstrating that it would have terminated her employment notwithstanding any consideration of race. *Cf. Price Waterhouse*, 490 U.S. at 251.

Even if Petitioner's allegations regarding racial bias on the part of the District's administrators were true, which they are not, the allegedly biased administrators did not participate in the Board's deliberations regarding the termination of Petitioner's employment. The record reflects a complete absence of any reliance on or reference to the views of either allegedly biased administrator. Absent such a causal link, Petitioner's reliance on the "cat's paw" theory is unavailing.

The Eighth Circuit's application of the "cat's paw" analysis is consistent with the seminal "cat's paw" case, *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990).[13] In *Shager*, the Seventh Circuit specifically *declined* to hold employers liable for every allegedly discriminatory act committed by employees in the workplace. *Id.* at 405. Rather, the Seventh Circuit required a *direct relationship* between the allegedly discriminatory conduct and the employer's adverse employment decision. *Id.* (requiring deference "to the judgment of the man on the spot" making the decision-maker "the conduit of [a supervisor's] prejudice – his cat's paw" before finding employer liability).

Similarly, precedent applying the "cat's paw" theory universally requires a "causal link" between the conduct

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[13] Consistent with its holding in this case, on other occasions where the Eighth Circuit applied the "cat's paw" analysis, the Eighth Circuit required, as a prerequisite to liability, a showing that the racial animus of the "man on the spot" *actually impacted* the ultimate adverse employment decision. *See Jiles v. Ingram*, 944 F.2d 409, 411 (8th Cir. 1991) and *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1057 (8th Cir. 1993).

of the allegedly biased supervisor and the ultimate decision to terminate an employee's employment. *See, e.g., Long v. Eastfield College*, 88 F.3d 300, 306 (5th Cir. 1996). Consequently, where the ultimate adverse employment decision is not tainted by or reflective of the alleged racial bias of a supervisor, no liability lies under the "cat's paw" analysis. The conclusion reached by the Eighth Circuit in this case is entirely consistent with the conclusion reached by every other circuit that has applied the "cat's paw" analysis.

Further, even if the allegedly biased administrators participated in the disciplinary process, which they did not, any alleged causal link between the alleged bias of Petitioner's supervisors and the Board's ultimate decision is broken by the Board's independent action. The Board viewed videotapes of work performed in Petitioner's classroom, under her auspices. The unchallenged evidence establishes that, based *solely* on that tape, which depicted an *"obvious"* violation of Board Policy, the Board terminated Petitioner's employment. Petitioner has not demonstrated, nor can she demonstrate, that the allegedly biased supervisors made any recommendation to the Board or impacted the Board's ultimate decision in any way. As the Eighth Circuit properly concluded, the absence of such evidence is fatal to Petitioner's discrimination claim, *see, e.g., Wilson v. Stroh Co., Inc.*, 952 F.2d 942, 945-46 (6th Cir. 1992), and a grant of Certiorari on this point is inappropriate.

Nevertheless, Petitioner also cites *Burlington Industries, Inc. v. Ellerth*, No. 97-569, 1998 U.S. LEXIS 4217 (June 26, 1998) in support of her race argument. However, *Burlington* is inapposite to this case, as that case involved

overt sexual harassment by a supervisor, who *specifically and directly participated* in creating the hostile work environment that ultimately lead to plaintiff's constructive discharge. No such causal link exists here.

Furthermore, contrary to the facts presented in *Burlington*, in this case there is no evidence that Petitioner was subjected to a racially hostile environment. Rather, the Board terminated Petitioner based on the conduct of Petitioner's students in Petitioner's classroom, created under her auspices. By Petitioner's own admission, the alleged racially biased supervisors played no role in the Board's termination of Petitioner's employment. Finally, *Burlington* involved a private employer, not entitled to the same level of deference afforded school boards in the administration of staffing and curriculum issues. *See, e.g., Hudson v. Wellston Sch. Dist.*, 796 S.W.2d 31, 33 (Mo. Ct. App. 1990).

Contrary to Petitioner's assertion, numerous courts have *not* "simply assumed" that an employer is liable for race discrimination because of a supervisor's racial bias, notwithstanding the good faith investigation by a non-biased decision-maker. Rather, in every case cited by Petitioner, the allegedly biased individual somehow impacted the investigation conducted by the "unbiased" entity.

For example, in *Simpson v. Diversitech*, 945 F.2d 156 (6th Cir. 1991), a case cited by Petitioner, the employee allegedly discriminated against was terminated after three disciplinary incidents. The discharge imposed by the unbiased investigator resulted from the employee's accumulation of three prior discipline reports. However,

unlike the case at bar, in *Simpson*, the allegedly biased supervisor submitted one of the three discipline reports relied upon by the unbiased decision-maker. Therefore, in *Simpson*, the allegedly biased supervisor "tainted" the otherwise unbiased decision-making process. No such facts exist in this case.

Similarly, in *Griffin v. Washington Convention Center*, 142 F.3d 1308 (D.C. Cir. 1998), another case cited by Petitioner, the allegedly biased supervisor impacted the decision-making process. Specifically, the appellate court found that the allegedly biased supervisor "was in fact an integral part of the decision-making process." *Id.* at 1311.

Moreover, the District of Columbia Court of Appeals specifically recognized, consistent with the Eighth Circuit's decision in this case and consistent with the Seventh Circuit's decision in *Willis v. Marion County Auditor's Office*, 118 F.3d 542 (7th Cir. 1998), that:

> [W]hen the causal relationship between the subordinate's illicit motive and the employer's ultimate decision is broken, and the ultimate decision is clearly made on an independent and legally permissive [sic] basis, the bias of the subordinate is not relevant.

*Willis*, 118 F.3d at 547. These are the precise facts of this case. The evidence in this case demonstrates the Board's reliance on the videotapes of Petitioner's students as reflecting Petitioner's breach of the Board's policy and thus the basis for terminating Petitioner's employment.

Finally, Petitioner cites *Roebuck v. Drexel University*, 852 F.2d 715 (3rd Cir. 1988) in support of her "cat's paw" argument. This case is equally inapposite, as it involves

reliance by the ultimate decision-maker on information derived from the allegedly biased supervisor. The evidence in *Roebuck* indicated that the unbiased decision-maker "had available *and considered* the reports and recommendations of each previous evaluator," including the allegedly biased evaluator. *Id.* at 727 (emphasis added). In contrast, the unchallenged evidence in this case demonstrates that the Board did not rely on, defer to, or in any other way base its ultimate decision to terminate Petitioner's employment on anything submitted by either of the allegedly biased administrators.

## CONCLUSION

Petitioner fails to establish any basis for granting the instant Petition. This case does not present a situation in which a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals. Furthermore, this case is not one in which a court has so far departed from the accepted and usual course of judicial precedent as to compel the exercise of this Court's supervisory authority.

Rather, the Eighth Circuit's opinion in this case is entirely consistent with precedent of this Court and opinions of other circuits. *Cf. Fraser*, 478 U.S. at 681.

Based on the foregoing, Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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